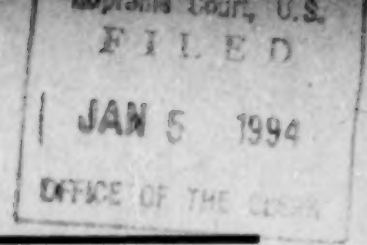


(9)
No. 92-1941



In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

JERRY W. CARLTON

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent invites the Court to discern in the guaranty of "due process of law" (U.S. Const. Amend. V) a constitutional mandate to strike down economic legislation that reaches results that are too "harsh" or "oppressive." The broad and subjective role that respondent asks this Court to undertake is one that the Court has frequently and firmly rejected.

Depending on one's personal point of view, and on one's economic status, the imposition of a particular tax may be seen as harsh or "unreasonable" (*Untermeyer v. Anderson*, 276 U.S. 440, 447 (1928) (Brandeis, J., dissenting)) or, instead, as the price "we pay for civilized society" (*Compania General de Tabacos de Filipinas v. Collector*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting)). It has never, to our knowledge, been suggested that the guaranty of "due pro-

cess of law" empowers this Court to invalidate *prospective* tax legislation on the subjective grounds that the tax is unfair, unwise, "harsh" or "oppressive." In authorizing the Legislative Branch "to lay and collect taxes" (U.S. Const. Art. I, § 8), the Constitution does not specify that Congress may enact only "fair" taxes and must avoid "harsh" taxes. The "fairness" or "harshness" of taxation is peculiarly a social and political judgment, to be made by the Legislature, not the Judiciary. The Founders designed the Constitution to ensure that the fairness of taxation would be resolved in representative, not judicial, debates.

As Justice Holmes concluded, the guaranty of "due process of law" has no different text for *retroactive* than for *prospective* adjustments to tax legislation. The Constitution affords no basis for a court to "state * * * articulately the ground for denying the power of Congress to lay [a retroactive] tax. * * * A tax may be levied for past privileges and protection as well as for those to come." *Untermeyer v. Anderson*, 276 U.S. at 446 (Holmes, J., dissenting). Indeed, prior to 1927, "no federal revenue measure ha[d] ever been held invalid on the score of retroactivity." *Id.* at 449 (Brandeis, J., dissenting):

For more than half a century, it has been settled that a law of Congress imposing a tax may be retroactive in its operation. * * * Each of the fifteen income tax acts adopted from time to time during the last sixty-seven years has been retroactive, in that it applied to income earned prior to the passage of the act, during the calendar year. The Act of October 3, 1913, c. 16, 38 Stat. 114, 166, which taxed all incomes received after March 1, 1913, was specifically upheld in *Brushaber v. Union Pacific R.R. Co.*, 240 U.S. 1, 20, and in *Lynch v. Hornby*, 247 U.S. 339, 343. Some of the acts have taxed income

earned in an earlier year. * * * The Act of February 24, 1919, c. 18, Title II, 40 Stat. 1057, 1058-1088, which taxed incomes for the calendar year 1918, was applied, without question as to its constitutionality, in *United States v. Robbins*, 269 U.S. 315, and numerous other cases.

* * * * *

* * * [R]etroactive legislation [imposing special assessments on property] has been sustained, although the * * * statute was not enacted until after the property benefited [by improvements retroactively funded by the assessment] had passed to a bona fide purchaser without notice of any claim that it had been, or might be, assessed for a benefit. *Seattle v. Kelleher*, 195 U.S. 351. * * * The right of the Philippine Government to retain import and export duties laid and collected without authority, was sustained where thereafter Congress by retroactive legislation confirmed the unlawful action in collecting the duties. *United States v. Heinszen & Co.*, 206 U.S. 370; *Rafferty v. Smith, Bell & Co.*, 257 U.S. 226. Liability for taxes under retroactive legislation has been "one of the notorious incidents of social life." *Seattle v. Kelleher*, 195 U.S. 351, 360. Recently this Court recognized broadly that "a tax may be imposed in respect of past benefits." *Forbes Boat Line v. Board of Commissioners*, 258 U.S. 338, 339.

Id. at 447-450 (Brandeis, J., dissenting).

In three decisions during the 1920's, however, the Court rejected the retroactive application of federal taxes which the Court concluded would be "wholly unreasonable" (*Blodgett v. Holden*, 275 U.S. 142, 147 (1927) (opinion of McReynolds, J.)) or "whimsical and burdensome" (*Nichols v. Coolidge*, 274 U.S. 531, 542 (1927)). In the years that followed, the

Court, of course, ultimately embraced the views of Justices Holmes and Brandeis in dissent from the "substantive" due process holdings of the *Lochner* era. See, e.g., *Nebbia v. New York*, 291 U.S. 502, 525 (1934); Pet. Br. 12-14 & 13 n.10. The Court also specifically rejected the standardless proposition that emanated from that era—and that respondent renews here—that a tax may be declared unconstitutional if, in the view of a reviewing court, it is thought to be too unreasonable, "harsh" or "oppressive."¹

The Court has instead held on several recent occasions that (i) retroactive economic and tax legislation is entitled to the same presumption of validity as prospective legislation and (ii) the burden of sustaining retroactive legislation under the Due Process Clause, against a challenge that the legislation is too "harsh" and "oppressive," is "met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984).

[A]lthough we have noted that retrospective civil legislation may offend due process if it is "particularly 'harsh

¹ A constitutional inquiry in that subjective form is an inadequate basis for "the exercise of [this Court's] high prerogative of declaring invalid an act of Congress" (*Untermeyer v. Anderson*, 276 U.S. at 453 (Brandeis, J., dissenting)). As Justice Brandeis properly concluded (*id.* at 454):

"One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." [*Sinking-Fund Cases*, 99 U.S. 700, 718 (1878).] * * * The presumption [that legislation is valid] should be particularly strong where, as here, the objection to an act arises not from a specific limitation or prohibition on Congressional power but only out of the "vague contours of the Fifth Amendment, prohibiting the depriving any person of liberty or property without due process of law," Mr. Justice Holmes, in *Adkins v. Children's Hospital*, 261 U.S. 525, 568.

and oppressive,' " [*United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13 (1977)] (quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938) * * *), that standard does not differ from the prohibition against arbitrary and irrational legislation that we clearly enunciated in *Turner Elkhorn*.

Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. at 733. As the Court stated in *General Motors Corp. v. Romein*, 112 S. Ct. 1105 (1992), even though "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation," "the test of due process" for the "retroactive aspects of [economic] legislation, as well as the prospective aspects," is whether they advance "a legitimate legislative purpose * * * by rational means."² *Id.* at 1112, quoting *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 730. See also Pet. Br. 14 (citing cases).

² The amici candidly acknowledge that the standard of review under the Due Process Clause described by this Court in *Pension Benefits Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. at 729-730, and in *General Motors Corp. v. Romein*, 112 S. Ct. at 1112, is the "current standard" used by "modern courts" (*Am. American Cause Br. 12*; *Am. Washington Legal Foundation, et al., Br. 6*). Amici Washington Legal Foundation, et al., contend (Br. 12-28), however, that retroactive application of the 1987 amendment to Section 2057 should be stricken as an "ex post facto" law under Article I of the Constitution. That provision states that "No Bill of Attainder or ex post facto Law shall be passed" (U.S. Const. Art. I, § 9, Cl. 3). Since 1798, in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), the Court has consistently interpreted the prohibition of "ex post facto" laws to apply only to criminal enactments and to have no application to retroactive civil legislation. The Court recently noted that this "exclusive definition of *ex post facto* laws" stems from its existence as "a term of art with an established meaning at the time of the framing of the Constitution." *Collins v. Youngblood*, 497 U.S. 37, 41-42 (1990).

This case, in any event, presents no occasion for review of this Court's well-established interpretation of the "ex post facto" clause. Respondent

It is evident that the novel, three-part substantive due process test adopted and applied by the court of appeals in this case strays far from this Court's modern decisions. The question ultimately posed by the court below, through its three-part analysis, is whether it is too "harsh" or "oppressive" to impose a retroactive tax that "upsets [respondent's] otherwise settled expectations" or "impose[s] a new duty or liability based on [respondent's] past acts" (*Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976)). The Court has clearly and expressly held, however, that these very concerns are not sufficient to condemn a retroactive tax under the Due Process Clause. *Ibid.*³ Instead, the due process inquiry for economic legislation is "simply [whether] the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. at 730. Accord, *United States v. Sperry Corp.*, 493 U.S. 52, 64-65 (1989).⁴

has raised no challenge to the statute under the "ex post facto" clause, either in the courts below or in its brief in this Court. The courts below accordingly had no occasion to, and did not, address the application, if any, of the "ex post facto" clause to this case. Nor is that issue within the scope of the question presented in the petition in this case (Pet. I). Respondent's only challenge to the statute is his assertion that, as applied to the estate's December 1986 transaction, the statute violates the Due Process Clause of the Fifth Amendment to the Constitution. See Complaint ¶ 35(c), at 13 (Tr. Doc. 1).

³ *Amicus* American Cause thus plainly errs in contending that "any tax law which disturbs settled expectations should be viewed as harsh and oppressive" (*Am. Br.* 2). See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 16 (citing cases):

[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. * * * This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.

⁴ Remarkably, of the several Members of Congress who join in a brief that asks the Court to invalidate the retroactive 1987 statute as an example of the "tyranny" of the majority (*Am. Washington Legal Foun-*

2. Respondent correctly notes that "[w]hat satisfies this purpose and means test in the context of prospective legislation may not suffice for retroactive legislation" (*Resp. Br.* 6). The "retroactive application of the legislation [must] itself [be] justified by a rational legislative purpose." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. at 730 (emphasis added). See also *United States v. Sperry Corp.*, 493 U.S. at 64. Retroactive application of the 1987 amendment to Section 2057 of the Internal Revenue Code complies with this requirement, for it rationally furthers a valid legislative purpose.

National legislation in general, and tax legislation in particular, is designed to accomplish public objectives. "Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits."⁵ *Welch v. Henry,*

et al., Br. 10), no fewer than five voted *in favor* of the challenged legislation. See 133 Cong. Rec. 37,088, 37,712 (1987). Moreover, in a democratic society, the actions of duly elected representatives are not ordinarily thought of as "tyranny," and it is certainly not "tyranny" that the majority, rather than the minority, prevails in our legislative system. It cannot, in any event, reasonably be contended that a curative amendment to an estate tax provision, designed to avoid unintended tax benefits for purely tax-motivated transactions, represents "tyranny" under any plausible definition of that term.

⁵ We note, in this context, that respondent's reliance on Contract Clause cases (*Resp. Br.* 10-12) is inapposite. In *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. at 732, the Court expressly rejected the suggestion that it "apply constitutional principles that have been developed under the Contract Clause, Art. I, § 10, Cl. 1 ('No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .'), when reviewing * * * federal legislation." The Court noted that it has "contrasted the limitations imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses. * * * And, although we have noted that retrospec-

305 U.S. 134, 146 (1938). When Congress makes a mistake in the phrasing of complex tax legislation, and thereafter becomes aware that various individuals may seek to profit at the public expense from this drafting error, it is in the public interest for the mistake to be corrected. This Court has recognized the importance of this public interest by endorsing the "unquestionably valid" power of Congress retroactively to "enact curative statutes" for tax legislation (*Graham & Foster v. Goodcell*, 282 U.S. 409, 428 (1931)). See also Pet. Br. 14-17.

The 1987 amendment to Section 2057 was a rational means of accomplishing this valid legislative purpose.⁶ Although Section 2057, in its original form, could be read to permit an executor to qualify for a windfall deduction by purchasing securities on the open market and promptly selling them to an ESOP, as occurred here, that reading of the statute was flatly at odds with the fundamental principle that tax legislation does not give effect to transactions that lack any economic motive other than tax avoidance. See, e.g., *Knetsch v. United States*, 364 U.S. 361 (1960); *Gregory v. Helvering*, 293 U.S. 465, 470 (1935).⁷ As Senator Bentsen, then Chair-

man of the Senate Finance Committee, stated in proposing the 1987 legislation, "Congress did not intend for estates to be able to claim the deduction by virtue of purchasing stock in the market and simply reselling the stock to an ESOP" (133 Cong. Rec. 4294 (1987)), and it did not intend to permit a deduction for "essentially sham transactions" (*ibid.*).

While respondent now claims surprise at this congressional concern, it is obvious that, if his imaginative application of the statute had been left uncorrected, the result would have been an unintended and wholesale erosion of the estate tax

been interpreted to afford tax benefits only to transactions that are of economic substance *apart* from tax avoidance. See, e.g., B. Bittker & J. Eustice, *Federal Income Taxation of Corporations and Shareholders* ¶ 14.51, at 14-170 (5th ed. 1987) ("a transaction should not be given effect for tax purposes unless it serves a purpose other than tax avoidance. Thus, a transaction heavily laden with tax avoidance motives may be disregarded as a sham."). Interpreted as respondent claims he did in 1986, however, Section 2057 would permit tax benefits for purchase-resale transactions performed for no purpose other than tax avoidance. It is the implausibility of such a facial reading of the statute, not the impossibility of such a reading, that underlies our claim that respondent could not reasonably rely on the original terms of the statute to obtain a benefit that appeared "too good to be true" and to create a tax "loophole you could drive a truck through" (A. Murray & J. Birnbaum, *New Loophole May Help Many Beat Estate Tax*, Wall St. J., Dec. 31, 1986, at 17, col. 2).

The potential hazards to respondent's reading of the original version of Section 2057 may not have completely escaped his attention during 1986. Evidently recognizing that a profit or business motive is required before a transaction is recognized for tax purposes, respondent claims that he did not prearrange a sale to the ESOP of the securities he purchased in the open market. By holding the stock for two days before the sale to the ESOP was made, the estate asserts that it took an economic risk that the price of the stock would rise or fall in the interim (Resp. Br. 38). By contrast, in *Ferman v. United States*, 993 F.2d 485 (5th Cir. 1993), petition for writ of certiorari pending, No. 93-569, the executor prearranged the ESOP sales and executed those sales on the same day that she purchased stock for the estate in the open market.

⁶ Because the 1987 amendment is curative, it is not necessary to rely solely on the cases that also recognize that the constitutional authority to lay and collect taxes is sufficient by itself to permit Congress retroactively to impose a "tax by a new statute, although the measure of it was governed by the income of the past year" (*Stockdale v. Insurance Cos.*, 87 U.S. (20 Wall.) 323, 331 (1873)). See also *Welch v. Henry*, 305 U.S. at 148; Pet. Br. 15-17 nn.11 & 12.

⁷ Respondent misses the point in arguing (Resp. Br. 39-40) that tax avoidance is not inherently evil. While a taxpayer has no "patriotic duty" to increase his taxes, the Internal Revenue Code has consistently

base and a staggering revenue loss. As financial observers noted during the same month that respondent's transaction occurred, "[t]his is the loophole you could drive a truck through" (A. Murray & J. Birnbaum, *New Loophole May Help Many Beat Estate Tax*, Wall St. J., Dec. 31, 1986, at 17, col. 2). Judge Norris accurately observed in dissent in this case that "the statute on its face offered a benefit that appeared 'too good to be true'" (Pet. App. 34a).⁸ As eminent tax counselors have cautioned their profession, "the lawyer's passion for technical analysis of the statutory language should always be diluted by distrust of a result that is too good to be true." B. Bittker & J. Eustice, *supra*, ¶ 14.51, at 14-170.

⁸ Respondent argues (Resp. Br. 14-20) that, when viewed in the context of the generous tax incentives that Congress has created to encourage employers to maintain ESOPs, his asserted reliance on the facially unlimited scope of Section 2057 was reasonable. When compared to the incentives afforded by other ESOP provisions, however, the congressional largess that respondent attributes to Section 2057 is dramatically greater. No other ESOP provision affords a taxpayer an opportunity completely to avoid his entire tax liability while guaranteeing no certain benefit to the Plan. Section 133 of the Code, to which respondent compares Section 2057 (Resp. Br. 18-19 nn.21, 22), allows banks to exclude 50% of interest income received from loans made to ESOPs. The result is that, "[a]t a ten percent interest rate, every nickel of tax base the Treasury loses lands a dollar in the pocket of an ESOP" (Pet. App. 35a (Norris, J., dissenting)). Under respondent's approach to Section 2057, however, the statute would permit an estate completely to remove its entire value from the reach of the tax. By engaging in a series of sham transactions, and deducting one-half of the sales prices of those transactions in calculating its taxable estate, the estate could escape tax entirely. As discussed in our opening brief, the interpretation that respondent claims he placed on the initial statute would cost the United States several times *more* in lost tax revenues than if it simply paid a "discount" for ESOP open market purchases directly to the ESOP itself. See Pet. Br. 27 n.19.

Congress has an unquestionably valid interest in correcting egregious and unintended "loopholes" in revenue legislation. In amending Section 2057 to make express that it did not encompass the unprecedented windfall that respondent seeks, Congress did no more than confirm the rational expectation that the statute was not intended to permit wholesale, facile evasions of the estate tax by imaginative executors.⁹ And, by prospectively amending the statute to impose this same requirement for post-1986 transactions, Congress ensured that its retroactive amendment of Section 2057 did not give "[a] more oppressive legal effect to conduct undertaken before enactment of the statute." *United States v. Hemme*, 476 U.S. 558, 569 (1986).¹⁰

⁹ Respondent unconvincingly asserts (Resp. Br. 23) that he gained no understanding of the congressional intent to limit the benefit of Section 2057 to estates of individuals who owned the securities during their lifetimes from the original legislative history of that provision. That history included at least two descriptions of the statute as making available to ESOPs from the estates of shareholders a pool of stock that otherwise might not be available for sale to plan trustees. See Pet. Br. 27 n.19. Stock purchased after the decedent's death on the open market—as in this case—obviously does not fall within those descriptions of the statute. To be sure, as respondent points out (Resp. Br. 23), these legislative references highlight a class of decedent owners without expressly limiting the deduction to that class. But, as Judge Norris noted in dissent, if "Congress had meant to allow any estate willing to undertake a relatively low-risk securities transaction to benefit from the ESOP proceeds deduction, then examples of decedent owners selling to their employees would be an infinitesimal proportion, not a prototypical example, of the beneficiaries of the rule" (Pet. App. 34a). See also note 7, *supra*.

¹⁰ In addition to imposing the decedent-ownership requirement, the complementary prospective amendment to Section 2057 also imposed requirements for the deduction for post-February 1987 transactions that are not applicable to pre-February 1987 transactions. See Resp. Br. 40-41.

The curative amendment that Congress adopted was a rational means of implementing this valid legislative purpose. By limiting the availability of the Section 2057 deduction to estates of decedents who owned the securities at the time of death, the 1987 amendment was made retroactive for "only that * * * period that Congress believed would be necessary to accomplish its purposes" (*Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. at 731). By making the curative legislation retroactive to October 1986, when Section 2057 was originally enacted, the statute provides a uniform rule for all estates to which the deduction is available. It did not deny the benefits of the deduction to any estate that made a sale of securities that the decedent owned at death. The retroactive (and prospective) amendment merely forestalls evisceration of the estate tax by the abusive use of Section 2057 to claim deductions for tax motivated, "essentially sham transactions" of the type in which respondent engaged.

3. Respondent errs in attempting to distinguish on their facts the numerous decisions of this Court that have upheld retroactive taxes and in contending that "actual or constructive notice" of a legislative enactment must, in every instance, precede its effective date (Resp. Br. 27-37). That contention is refuted by both early and modern holdings of this Court. In *Stockdale v. Insurance Cos.*, 87 U.S. (20 Wall.) 323 (1873), for example, the Court held that Congress could retroactively impose a "tax by a new statute, although the measure of it was governed by the income of the past year." *Id.* at 331. Similarly, in *Welch v. Henry*, 305 U.S. 134 (1938), the Court upheld the retroactive imposition of a state tax on dividends received in the year preceding the enactment even though no advance "notice" of the legislation existed. In upholding the retroactive state tax, the Court observed that Congress frequently enacts income tax laws that "redistribute[] retroactively the tax burdens imposed by preexisting

laws." *Id.* at 148. In *Usery v. Turner Elkhorn Mining Co.*, in holding that retroactive legislation is not unconstitutional merely because it "upsets otherwise settled expectations" and "impose[s] a new duty or liability based on past acts" (428 U.S. at 16), the Court directly rejected a constitutional "notice" requirement of the type that respondent proposes.

Courts have repeatedly rejected the suggestion that new legislation may not constitutionally be applied to transactions that occurred without actual or constructive notice of its pending enactment. See Pet. Br. 20-24. Congress is frequently called upon to make "retroactive revisions of the federal * * * revenue laws" and, in doing so, "impose[] taxes on subjects previously untaxed and shift[] the burden of old taxes by changes in rates, exemptions and deductions" (*Welch v. Henry*, 305 U.S. at 145). Every taxpayer "should be regarded as taking his chances of any increase in the tax burden which might result from carrying out the established policy of taxation." *Milliken v. United States*, 283 U.S. 15, 23 (1931). In a conclusion that applies directly to this case, the Court has held that a taxpayer can not "justly assert surprise" or claim immunity from tax burdens when Congress retroactively adjusts prior tax legislation in light of experience "at the first opportunity after knowledge of the nature and amount of the income is available." *Welch v. Henry*, 305 U.S. at 150. See also Pet. Br. 20-24.¹¹

4. Respondent asserts (Resp. Br. 34) that, because his transactions were purely tax motivated, he would not have

¹¹ In *United States v. Darusmont*, 449 U.S. 292 (1981), the Court noted that, "[i]n enacting general revenue statutes, Congress almost without exception has given each such statute an effective date prior to the date of actual enactment." *Id.* at 296. The Court stated that, "to challenge the * * * tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute." *Id.* at 298, quoting *Welch v. Henry*, 305 U.S. at 147.

engaged in the purchases of stock in December 1986 but for his expectation that he would qualify for the Section 2057 deduction. He contends that Congress should not retroactively "deprive[] a citizen of a benefit that the government used to induce that citizen to behave in a particular way" (Resp. Br. 10). That contention, of course, directly conflicts with this Court's conclusion that retroactive legislation is not invalid merely because it "upsets otherwise settled expectations" (*Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 16). It also confuses public legislation with private contracts.

Legislation is not a promise and taxpayers have no vested right in the Internal Revenue Code. As this Court has noted on several occasions (*United States v. Darusmont*, 449 U.S. at 298, quoting *Welch v. Henry*, 305 U.S. at 146-147):

Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process * * *.

Legislation seeks to accomplish public objectives through generally applicable standards. When Congress makes a mistake in the phrasing of its legislation, it is in the public interest for that mistake to be corrected. The legislative power to give retroactive effect to curative tax legislation is most compelling when, as here, a matter of legislative grace, such as a deduction, exemption or other privilege, is at stake. See *Miller v. Commissioner*, 115 F.2d 479, 480 (9th Cir. 1940), cert. denied, 312 U.S. 703 (1941). There is an "unquestionably valid" power in Congress to "enact curative statutes" to perfect the terms and conditions under which public revenues are assessed and collected (*Graham & Foster v. Goodcell*, 282 U.S. at 428).

In this case, as in *Welch v. Henry*, 305 U.S. at 150 (upholding application of a new state tax to "the receipt of income during the year * * * preceding that of its enactment"), the taxpayer asserts that his conduct would have differed if he had been aware at the outset of the legislative revisions thereafter enacted.¹² In *Welch*, the Court rejected the claim that the Constitution protects taxpayers from "the particular inconvenience * * * in being called upon * * * to bear a governmental burden of which it is said he had no warning and which he did not anticipate." *Welch v. Henry*, 305 U.S. at 148. "Assuming that a tax may attempt to reach events so far in the past as to render that objection valid, * * * no such case is presented here," for "taxpayers can[not] justly assert surprise or complain of arbitrary action in the retroactive apportionment of tax burdens to income at the first opportunity after knowledge of the nature and amount of the income is available." *Id.* at 150.

Moreover, as discussed in our opening brief (Br. 4 n.6 & 28), it is the economic risk associated with the timing of respondent's transaction, not the inducement of "the benefit of the Section 2057 deduction" (Resp. Br. 14), to which the estate's loss in this case is most directly attributable. Respondent does not dispute that, if he had engaged in the same transaction only a few days earlier, the estate would have realized a sizeable profit instead of a loss from the transaction. See Pet. Br. 4 n.6.¹³ It was the timing of respondent's

¹² In *Welch*, the Wisconsin legislature retroactively imposed a tax on dividends received from Wisconsin corporations, for which the State previously had allowed a deduction on individual income tax returns. The taxpayer in *Welch*, like the taxpayer here, asserted that this retroactive change in the tax treatment of his completed financial transactions represented a deprivation of vested property rights without "due process of law." 305 U.S. at 141.

¹³ The tax effects of the estate's "loss" from the purchase and sale of the MCI stock are not at issue in this case. If a profit or business motive

purchases, not the inevitable application of the statute, that produced the "loss" for the estate. And, whether respondent realized a "loss" or a "gain" from the transaction, in either situation the amount of the claimed deduction under Section 2057 would be the same. *Ibid.*

Under the theory of the court of appeals, however, the "loss" incurred by the estate in this particular transaction played a dispositive role (Pet. App. 19a). Under the "detrimental reliance" rationale of the court of appeals, the retroactive amendment to Section 2057 would evidently have been constitutional if respondent had purchased the MCI stock on December 3, 1986, instead of on December 10, 1986, for respondent would then have no "detriment" of which to complain. See Pet. Br. 4 n.6. There is no precedent for such wavering constitutional guidelines for retroactive legislation. Instead, under this Court's prior holdings, the 1987 amendment satisfies the requirements of due process because it represents a rational means of accomplishing Congress's "unquestionably valid" purpose of promptly curing acknowledged defects in the drafting of complex tax legislation.

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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existed for the estate's transaction, respondent may be able to establish a basis for an income tax deduction for that loss. See 26 U.S.C. 165. In this case, however, only the estate tax deduction (for one-half of the sale proceeds) under Section 2057 is at issue.